

Commentary

Benno Schmidt vs. Rehnquist and Scalia

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Benno Schmidt, president of Yale University, is greatly troubled by the nominations of William Rehnquist as Chief Justice and Antonin Scalia as Justice of the Supreme Court.¹ They are, he states, “plainly designed to produce seismic change in the content of our constitutional law and in the role of the Supreme Court in our political system.” He portends that Rehnquist may lead the Court away from “the activist, constitutional premises and methods of the Warren Court,” and considers that “these appointments constitute a greater challenge to the received tradition of constitutional law than any we have seen for a half century.” This “received tradition,” he explains, was itself “set in motion by the Constitutional Revolution of 1938,” and was marked by a retreat “from judicial activism in economic regulation” and shift to “activism for protection of minority rights and civil liberties.”

No “revolution” and its “innovations” is sacrosanct; each generation is free to make its own revolution or counter-revolution. Why should Rehnquist and Scalia feel bound by the dead hand of Earl Warren, who discarded long-standing precedents in droves, so many that Professor Phillip Kurland justly remarked, “The list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook.”² The “received tradition” theretofore was to rely on the Founders’ design, and it is therefore unjust to brand Rehnquist’s preference for their original intention as a “reactionary constitutional vision.” Justices, after all, are sworn to support the Constitution, not Warren’s “revolution.” “However the Court may interpret the provisions of the Constitution,” said Charles Warren, “it is still the Constitution which is the law, not the decisions of the Court.”³ Justices as diverse as Chief Justice Burger, Justice Douglas and Justice Frankfurter have claimed the right to look at the Constitution for themselves.⁴ Certainly Justice Rehnquist is not out of touch with the “temper of the times” with respect to school prayer, death penalties and the like. Like Schmidt, I am not an anti-abortionist nor advocate of prayer in the

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1. Schmidt, *The Rehnquist Court: A Watershed*, N.Y. Times, June 22, 1986, at E 27, col. 2. They have since been confirmed by the Senate.

2. P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* 90-91 (1970).

3. 3 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 470-71 (1922).

4. Burger rejected the “thesis that what the Court said lately controls over the Constitution.” L. LEVY, *AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE* 29 (1974). Douglas wrote, a judge “remembers above all else that it is the constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.” Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949). Frankfurter considered that “the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.” *Graves v. New York ex. rel. O’Keefe*, 306 U.S. 466, 491-92 (1939).

schools; but unlike him I do not mistake my predilections for constitutional imperatives.

Schmidt's "activist premises" are short-hand for judicial importation of mandates not to be found in the Constitution or its history. It is widely agreed that most of the "human rights" fashioned by the modern Court are without warrant in the Constitution—they are judicial constructs pure and simple."⁵ So the Court acknowledged in the "sodomy" case.⁶ There Justice White observed that despite the procedural implication of the due process language, the Court has read substantive restrictions into due process and has recognized "rights that have little or no textual support in the constitutional language,"⁷ and indeed are precluded by the history of the Constitution. The Court refused "to discover new fundamental rights imbedded in the Due Process Clause," explaining that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."⁸ "Otherwise," White stated, "the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority."⁹

Simply stated, the judicial creation of such "individual rights" deprives the people and the states of the right to self-government guaranteed to them by the tenth amendment. In the case of death penalties, for example, which the lion's share of the public demands, the Court would cram its morals down the throats of the people, in reliance on the "cruel and unusual punishments" clause—a clause clearly not intended to apply to death penalties, for the accompanying fifth amendment recognizes that life may be taken after a due process trial.¹⁰

There are, to be sure, academicians like Rober Cover of Yale who thrust aside "the self-evident meaning of the Constitution" in favor of an "ideology" which "we" allegedly have entrusted the Court with the task of framing.¹¹ Where, Rehnquist and Scalia would be justified in asking, did "we the people" make such a grant?

In praise of the Warren Court, Schmidt notes that its "valiant efforts to exorcise the constitutional demon of racism required the Court to upset long-held patterns of deference to state courts and state legislatures." Worse, the Court even upset the framers' determination to leave segregation to the states. The history of the fourteenth amendment makes very plain that except for certain purposes the framers meant to preserve state control over local, internal matters.¹² And academicians increasingly agree that the framers meant to leave segregation untouched, to be controlled by the

5. For a number of activist statements to that effect, see Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 OHIO ST. L.J. 611, 615 n. 44 (1983).

6. *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986).

7. *Id.* at 2844.

8. *Id.* at 2846.

9. *Id.*

10. See R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 29-58 (1982).

11. Cover, Book Review, *The New Republic*, Jan. 14, 1978, at p. 26, 27.

12. "Neither the [fourteenth] amendment . . . nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health . . . education . . . and good order of the people. . . ." *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

states.¹³ No more than Schmidt am I a devotee of racism; but for me the integrity of the Constitution has ever been paramount. I would not manipulate the Constitution to effectuate my social aspirations. With George Washington, I believe that there should be "no change by usurpation [read judicial amendment]; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments may be destroyed."¹⁴ And as Hamilton emphasized, "every breach of the fundamental laws, though dictated by necessity . . . forms a precedent for other breaches where the same plea of necessity does not exist at all."¹⁵ Schmidt himself notices that "activism in pursuit of racial equality easily and naturally led to activism in pursuit of other constitutional ends."

To the extent that Rehnquist is "at odds with virtually all major aspects of the Warren Court's constitutional innovations," he is merely reverting to the design of the Founders. Justices as dissimilar as Douglas and Frankfurter refused to be bound by the view of their predecessors and insisted on looking to the Constitution for themselves.¹⁶ What Schmidt considers to be "reaction in constitutional fundamentals" is in truth a return to the "fundamentals" of the Founders.

What did the Founders intend the "role" of the Court to be? From Francis Bacon, Justice James Wilson, next to Madison as architect of the Constitution, and through repeated affirmations of the Court, it has been underlined that the role of the Court is to interpret, not to *make* law.¹⁷ Chief Justice Marshall, cognizant of the separation of powers, declared that "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law"¹⁸ Judicial *law-making* subverts federalism, and under federalism the states were to be shielded from federal exercise of ungranted power, as the tenth amendment hammered home. When the Court grafts new requirements on to the Constitution, it is *making* the most fundamental law in violation of the separation of powers, of the amendment power, and often of states' rights.

Insofar as Rehnquist and Scalia would defer to the states, they can stand on the authority of the Founders. Madison wrote that "[i]n the new government, as in the old, the general powers are limited. [T]he States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction."¹⁹ Chief Justice Marshall referred to "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government."²⁰ In Federalist No. 39, Madison assured the ratifiers that the federal jurisdiction "extends to certain enumerated objects only, and leaves to the . . . States a residuary and *inviolable sovereignty over all other objects*."²¹ Given that the various "rights"

13. For citations see Berger, *The Activist Legacy of the New Deal Court*, 59 WASH. L. REV. 751, 759-60 n. 57 (1984).

14. 35 G. WASHINGTON, WRITINGS 228-29 (J. Fitzpatrick ed. 1940).

15. THE FEDERALIST No. 25, at 158 (A. Hamilton) (Luce ed. 1976).

16. See *supra* note 4.

17. For citations, see Berger, *supra* note 13 at 785.

18. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825).

19. THE FEDERALIST No. 40, at 255 (J. Madison) (Luce ed. 1976).

20. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

21. THE FEDERALIST No. 39, at 249 (J. Madison) (Luce ed. 1976) (emphasis added).

constructed by the Court in recent years have no constitutional warrant, Rehnquist and Scalia may safely be guided by the original intention to safeguard state control of local matters.

By no means am I confident that the Reagan appointees will adhere to the Founders' design whatever the political cost. But I am content to accept as a starting point a return to first principles that coincide with their political views, secure in the knowledge that in spelling out the constitutional basis for honoring the original intention, they cannot fail to leave an impression that will influence future decisions.